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Supreme Court of the United States

OCTOBER TERM, 1913.

STATE OF ARKANSAS,
Complainant,

vs.

STATE OF TENNESSEE,
Defendant.

No. 19 Original.

Supplemental Argument for State of Tennessee.

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Memphis Linotype Printing Co.

INDEX AND AUTHORITIES.

1st. The right to recover submerged lands does not depend upon the principle of accretion, as argued in the brief for the State of Arkansas, but because the title is in the owner of the submerged land, and as such, he is entitled to deposits made thereon, whether resulting from accretion or avulsion, or reclamation produced by artificial means. (Pages 1 to 22.)

Cases cited:

2d. The answer of the defendant denies there were any accretions to the Arkansas shore prior to 1876. (Pages 2 to 5.)

Rec. p. 2 to 5.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

STATE OF ARKANSAS,

vs. No. 7 Original.

STATE OF TENNESSEE.

SUPPLEMENTAL ARGUMENT FOR THE STATE OF TENNESSEE.

May It Please the Court:

We desire to present for the consideration of the Court, a supplemental argument as to the seventh proposition stated in brief for complainant at page 17, which is as follows:

> "When the avulsion of 1876 occurred, land, which had been theretofore submerged by the gradual encroachments of the river and had become the river bed, was not restored to the original proprietor on

> the retirement of the river, because the recession of the water was sudden and visible, not gradual and imperceptible. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly."
>
> Brief for Arkansas, p. 17.

This proposition is discussed at pages 35 to 51, inclusive, of the printed brief filed in her behalf. The position of the State of Arkansas, as stated upon pages 35 and 36 of the Argument, is as follows:

> "This brings us to the seventh proposition of law advanced above, which relates to the recession of the water from the abandoned bed of the river, as the result of the avulsion, and to the eighth and ninth propositions of law, relating to the effect of the gradual encroachment of the river on the title of the riparian owner and the vesting in the State of title to land which gradually and imperceptibly becomes a part of the bed of a navigable river."
>
> Brief of Arkansas, pp. 35, 36.

ANALYSIS OF THE ANSWER OF THE STATE OF TENNESSEE PERTINENT TO THIS PROPOSITION.

As pertinent to this proposition the attention of the Court is called to the answer of the State of Tennessee as to the changes made on the Arkansas and Tennessee banks, and especially the Dean's Island bank on the Arkansas shore between the year 1835, at which time the banks and course of the river may be definitely determined, and the date of the avulsion in 1876. We quote:

"Futher answering the third paragraph of the bill, respondent denies that prior to 1874 there had been any accretions to the west of Dean's Island, or any erosion into the Tennessee shore opposite, or that the main channel of the Mississippi River, or the channel of commerce of said river, had been changed or deflected from around the north of Island 37 to between said island and the main Tennessee shore, as alleged in the bill."

Ans. pp. 3, 4.

* * * * * * *

"It is true that since Tennessee and Arkansas were admitted to the Union many changes have occurred in the course and banks of the Mississippi River, and while some of said changes were by erosion and accretion, nevertheless, changes from such causes did not occur at all the places designated in the five subdivisions of the fifth paragraph of the bill, which respondent now specifically answers·

(1) It is true that considerable portions of Dean's Island on the east and southeast sides thereof had been gradually worn or washed away by the waters of the river.

(2) Respondent denies that there had been, as alleged in the bill, erosions into the Tennessee bank opposite the south and west part of Dean's Island, which had caused said shore line to recede, and Dean's Island to increase by accretions, whereby Tennessee lost and Arkansas gained; but on the contrary she avers that some changes had been made in the shore line on the Tennessee side, immediately south and west of Dean's Island, but not southwest thereof, and she further avers that such changes as had occurred on the Tennessee shore prior to 1876 were the *result of avulsions* and *not of erosions*, and

therefore Tennessee did not lose, nor Arkansas gain thereby.

(3) It is true that there had been some considerable erosion into the Arkansas shore or bank north of and opposite to Island 37 and a corresponding, or greater, addition by accretion to said island.

(4) Whether there had been accretions to the Arkansas bank and erosion into the Tennessee shore at the place called Plum Island No. 38, respondent is not advised, and therefore can neither admit nor deny the allegations of the fourth subdivision of the fifth paragraph, but demands proof thereof.

(5) It is true, as respondent is informed, that between the places called Devil's Elbow and Brandywine Point, the Arkansas bank or shore had lost and receded by erosion, and the Tennessee shore had correspondingly, or in a greater degree, gained by accretions."

Ans. pp. 6, 7.

* * * * * * *

"Respondent denies that all the changes in the Mississippi River prior to 1876 at what complainant calls the *locus in quo*, were gradual and imperceptible, as alleged in the sixth paragraph of the bill."

Ans. p. 7.

* * * * * * *

"9. Respondent, upon information, denies that prior to the avulsion of 1876 there had been any permanent addition to, or enlargement of, the Arkansas shore or bank by accretion along what complainant calls the *locus in quo*, and avers that at many places, some of which are admitted in the bill, there had been permanent gains to the Tennessee shore by gradual and imperceptible accretions, by which said shore was extended beyond the bank of 1823."

Ans. pp. 15, 16.

Thus, the answer denies the averments of the bill, that the changes at the *locus in quo* between 1835 and 1876 were gradual and imperceptible, and likewise denies that there were accretions to Dean's Island on the Arkansas shore during that period. It refers to the decision of the case of the *State of Tennessee v. Muncie Pulp Company*, 119 Tenn., p. 47, as sustaining its denial of the facts as set forth in the answer. (Ans. pp. 12, 13.) The answer also avers that the changes in the Mississippi River at the *locus in quo* prior to 1876 were the result of avulsions and not erosions. Hence, under the facts thus stated in the answer, and which on this motion are deemed to be true,

The Question Presented Is:

Whether lands submerged as the result of an avulsion, when restored by the recession of the waters and capable of being identified, belong to the original owners, when the recession of the water results from an avulsion.

Arkansas contends that the doctrine of reliction or the reappearance of submerged lands,

> "only applies when land is recovered gradually and imperceptibly."
>
> Brief of Arkansas, p. 17.

This is again stated on page 36 of the Argument:

> "We submit, in the first place, that reliction, meaning land from which the water has receded, has no reference to land uncovered by the *sudden recession of water resulting from an avulsion, but that it*

is similar in principle to the doctrine of accretion." (The italics are ours.)

Brief of Arkansas, p. 36.

If the position of Arkansas is correct, then there is no such thing as the restoration of submerged lands, unless it is the result of an accretion, and the rule governing accretions would give to the riparian owner the lands so gained, whether is was submerged land or not.

The reasons usually given for the above rule, that is, that the riparian owner is entitled to what may be added to his land by accretion, are: First, that it falls within the maxim "*de minimis lex non curat,*" or, because the riparian owner, by the action of the encroachment of the water, is liable to lose soil, and he should also have the benefit of any land gained by the same action; or, which seems to us the better reason and the broader principle, that being the riparian owner, he is entitled to remain such, and not to be cut off from access to the water by formations made adjoining his land as the result of accretions. In *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, the Court, after noticing the first two of the above reasons, said:

> "But it seems to us that neither of these are adequate reasons for departing from a well-settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the case of riparian ownership on a tortuous river, with an ill-defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere "rim" on the bank of a river may some-

times acquire an accretion or reliction much larger than the parent estate, but that is an incident to all riparian ownership; and it was never suggested, in the case of a stream, that such a state of facts furnished any reason for making the case an exception to the general rule.

Courts and text writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and beneficient principles of the common law, and we cannot help thinking this is somewhat so as to the right of a riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *deminimis lex non curat*, or that, because the riparian owner is likely to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz., to preserve the fundamental riparian right on which all others depend, and which often constitutes the principal value of the land, of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts."

18 L. R. A., 677-678.

The position of the State of Tennessee is that it is not essential for submerged lands to be restored as the result of accretion, but, as in the instant case, it may result from an avulsion, although the filling up or restora-

tion of land caused by a recession of the waters is slow and gradual.

The bill avers that the recession of the water was gradual, saying:

> "The waters *gradually* receded from the old and circuitous channel about Island No. 37 and Devil's Elbow, and that which had before been the bed of a large river, became, in due course, comparatively dry land."

Bill, p. 5.

CONTENTION OF TENNESSEE.

We maintain that it is immaterial whether the restoration of the land was by accretion, avulsion or caused by the act of man. In any of these events, where lands which have been submerged and are capable of being identified, they belong to the original owner, whether they be regained from any of the above causes. The principle upon which the owner of submerged land is entitled to land formed within his original boundaries is that when the soil is covered by water or the top of his land is washed away, he does not thereby lose ownership of the land thus covered by the water, and when land is formed within his original boundaries he becomes the owner of it.

The theory upon which the right to be restored to lands lost by submergence is no where better stated than in a footnote to the fifth edition of Angell on Water Courses, p. 61, footnote 4, where it is said:

"The changing of the bed of the river Connecticut, in the town of Weathersfield, has been the occasion of much litigation in that town, respecting the title to the soil. Mr. Butler, who owned a tract upon which the river was encroaching, found, after a while, some of his land appearing on the opposite side of the river, and accordingly laid claim to it. This claim was disputed, as he never owned land on that side of the river. It was a long while before this case was decided. There appeared some difficulty in making the jury who sat on the case to understand the merits of the question. Mr. Ingersoll, a member of the Ingersoll family of New Haven, was the counsel employed by Mr. Butler. He illustrated the case by supposing that Mr. B. had built a castle on the land in question. Although the ground on which it stood might be overflowed, it was still his castle, and the ground was his on which it stood, and he had a right to his property wherever he could find it. The case was finally determined in accordance with these views. (From Hayward's New England Gazetteer.)

In *Hargraves' Law Tracts* (Sir Matthew Hale's de Jure Maris), 36, 37, it is said:

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property, and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years.' But if it be freely left again by the reflex and recess of the

> sea, the owner may have his land as before, if he can make it out where and what it was: for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues."

And again:

> "As touching islands arising in the sea or in arms of creeks or havens thereof, the same rule holds which is before observed touching acquests by the reliction or recess of the sea, or such arms of creeks thereof. Of common right and *prima facie* it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven doth in point of property belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety."

In the early case of *Morris v. Brooke*, decided July, 1815, by the Delaware Court of Common Pleas, and reported in a note, 53 Am. Rep. 215, the question of the reappearance of submerged land and the principles upon which it is founded were announced. That case has been frequently cited and quoted from. It appears from the report in 53 Am. Rep., supra, the plaintiff rested his title to the claim of a bar upon two grounds: First, that it was annexed by alluvion to Little Tinnicum; and, second, that it was found on the same spot that was formerly occupied by Little Tinnicum, which had been washed away by the river for a very considerable distance, but thus restored again.

The Court found that as the bar had formed below the island and was for a long time entirely distinct from it, it would not afford support to the plaintiff's claim to it as of alluvion, but held for the plaintiff upon the second ground. We quote from the opinion where the Court states the rule contrary to the contention made here for the State of Arkansas:

> "New islands arising in the sea or in a navigable river *prima facie* belong, according to the common law, to the king, in England, and in this country to the State. But this rule is not universal.
>
> The right to the new islands and also to lands gained by alluvion or dereliction (in cases where they are not gained by *insensible* degrees), all of which are governed by the same principles, follows *the right to the soil which is covered with water.* As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative.
>
> But where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments (2 Bl. Com. 262; Hale de Jure Maris, chaps. 4 and 6)." (Italics as they appear in the opinion.)
>
> 53 Am. Rep. 215, 216.

After quoting from *Hale de Jure Maris*, Chap. 4 and 6, the Court concluded:

> "The case of the *Town of Shinbridge*, in 18 H. 3, is stated in page 16. 'The river of Severn had gained upon the town of Shinbridge so much that its channel ran over part of Shinbridge lands and lost

part thereof unto the other side (Aure), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it at all claimed by the king, though Severn be in that place an arm of the sea; but it was restored to Shinbridge as before. The propriety of the soil was not lost to the owners who had it before.' 'The soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea while it is covered with water be the king's, it cannot become the subject's because the water has left it. But when the land, as it stood covered with water, did by particular usage or prescription belong to a subject, then *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris, vel brachii ejusdem*, belongs to the same subject.' Id. p. 31. 'As touching islands arising in the sea, or in the arms or creeks, or havens thereof, the same rule holds which is before observed touching acquests by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie*, it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private property of a subject will be long to a subject, according to the limits and extent of such propriety, for the propriety of such a new accrued island follows the propriety of the soil before it came to be produced. Id. 36, 37.

This principle, so strongly supported by authority, and so evidently grounded on reason and justice, proves that Wilson's bar is not to be considered as a new island belonging to the commonwealth, and the

subject of a grant from the commonwealth, but that it is a part of that island and the property of the owner of that island. Though the surface of the lower part of that island was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water. If it was regained, either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters, if circumstances permitted. The earth deposited on it by the river became his by the right of alluvion, and, of course, this island formed on it by such deposit became his. And though it probably has now extended beyond the limits of the old island, the addition is plainly an alluvion, as it has arisen from gradual and imperceptible accretions."

In *Mulry v. Norton,* 100 N. Y. 426, 53 Am. Rep. 215, the Court had for determination the title to Far Rockaway Beach. It appears that between 1835 and 1869 the beach had washed away, but had subsequently reappeared. The Court did not deem it important as to whether the reappearance had been gradually and by accretion, or otherwise, for it said:

"It is quite unimportant, if not impossible, to follow in detail, but usually consisted of a line or group of bars, shoals, islands and channels, extending from the inlet to the shore of the mainland beyond the premises in dispute, but which were constantly undergoing physical changes by the influence of the

laws to which they were naturally subject." (53 Am. Rep. 208.)

This is further emphasized when the Court proceeds to announce the principles governing the submergence and reappearance of land, which it does after discussing the general rules of accretion and erosion, as follows:

> "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.
>
> When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its *gradual retirement therefrom or the elevation of the land by avulsion or accretion*, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. *Angell Tide Waters* 76, 77; *Houck Rivers* 258. Neither does the lapse of time during which the submergence continues bar the

right of such owner to enter upon the land reclaimed, and assert his proprietorship. *Angell Tide Waters* 77-80, and cases cited." (53 Am. Rep. 210, 211.)

After citing and quoting from authorities, the Court concluded as follows:

"The evidence in the case and the finds of the trial court concur in establishing the fact that during the period of change hereinbefore mentioned, portions of the beach in front of plaintiff's premises became submerged, but at all times there existed upon or near such premises, shoals, bars or islands, which afterward became the nucleus around which gathered the deposits now composing the land subject to litigation. It seems to us clear that the owners of this property did not lose their title thereto by reason of the changes described, and that the state has not acquired any property therein. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tideways outside of the boundaries of property subject to individual ownership." (53 Am. Rep. 212-213.)

The fact that at the time this suit was pending there was a lagoon between the plaintiff's hotel property and the beach was held to constitute no obstruction to the proprietorship of the beach formation, because it was located within the original boundaries of the plaintiff's possessions. Said the Court:

"It would seem also to follow as the necessary consequence of these rules that the existence of the lagoon between the plaintiff's hotel property and

the beach constitutes no obstruction to his proprietorship of the beach formation, however created, if located within the original boundaries of his possession. *Deerfield v. Arms*, 17 Pick. 43; s. c., 28 Am. Dec. 275. It was held in the case of *Railroad Co. v. Schurmeir*, 7 Wall. 272, that a sandbar in the Mississippi river divided from the mainland by a slough twenty-eight feet wide, and which at high water was entirely submerged, belonged to the riparian owner, although the acts of Congress made the river a public highway at the place in question. It is also said that 'rocks and shoals lying along the margin of navigable fresh rivers belong to the riparian owners.' *Gould Waters* 77." (53 Am. Rep. 212.)

The case of *Mulry v. Norton*, 100 N. Y. 426, 53 Am. St. Rep. 206, has been frequently referred to as the leading American case upon this question. In commenting upon this case counsel for Arkansas deny its applicability to the facts of this case, saying:

"The Tennessee court quoted from the opinion of the New York court and undertook to apply the rule of law there announced, and which was pertinent to the facts with which the Court was dealing, to an entirely different state of facts controlled by entirely different legal principles. *In the New York case the riparian owner had lost his beach by sudden and violent changes, and it had been restored to him in the same way.*

In the case at bar, Tennessee had lost her shore line by *gradual crumbling away*, and the Tennessee shore into which the river eroded was never restored, but, on the contrary, was carried into the river, and no human being could identify any of that soil which

had eroded from the Tennessee shore during the years when the river was increasing in width."
Brief for Arkansas, pp. 42, 43.

From quotations already made of the answer, the Court will see that the Tennessee shore was lost as a result of avulsions or sudden and violent cavings of the banks, whereby the lands of the riparian owners on the Tennessee side were submerged under the waters of the Mississippi river. The lands thus submerged reappeared as the result of an avulsion, but the river bed filled up slowly by the deposit of alluvium on the bottom of the old bed and the gradual withdrawal of the waters.

If counsel's analysis of the principle of the Mulry case be conceded as correct (which we do not), it supports the contention of Tennessee as here presented, as well as the holding of the Supreme Court of Tennessee in the case of *Muncie Pulp Company v. State*, which is the subject of attack in this case.

In *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185,[1] the question presented was whether the city lost the title to certain portions of Lake Park, which had been submerged by the waters of Lake Michigan, the land being subsequently reclaimed by the action of the city. The

[1]We quote the following head notes from 61 Am. St. Rep. 185:

"RIPARIAN RIGHTS IN SUBMERGED SOIL—A riparian owner whose land is submerged by water does not lose his property therein if he afterward reclaims it, either by *natural or artificial means;* nor does lapse of time during submersion bar the owner's right to reclaim the land.

DEDICATION—RECLAMATION OF SUBMERGED SOIL.—If, after land is dedicated to a city as a public park, it becomes submerged with water, and *the city reclaims it*, it thereby reasserts its title thereto and holds the land subject to the terms of the dedication." (Italics are ours.)

submergence of the land was stated in the opinion to have been—

> "plainly discernable after every storm, and the city made unavailing efforts to protect the shore from this destruction." (169 Ill., p. 406.)

The Court stated the question before it to be:

> "Did the city lose its title and rights to the portions of this park submerged by the waters of the lake after its dedication, or did its subsequent reclamation restore the city to its rights? Did the temporary submergence of such portions destroy the restrictions imposed by the dedication, so that the reclaimed portion would not be subject to the same?" (Page 406.)

After quoting from *Hargrave's Law Tracts*, *Morris v. Brooke*, *supra*, *Mulry v. Norton*, *supra*, *Angell on Tidewaters* 77, 80, *Angellon Water Courses*, Sec. 60, 3 *Washburn on Real Property* 453, *Gale v. Kinzie*, 80 Ill. 132, the Court answered the interrogatory above quoted as follows:

> "Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof." (Page 408.)

The Correct Principle Governing This Case Announced and Applied in Stockley vs. Cissna, 119 Fed. 812, 831-32.

The correct principle is that new land forming where plaintiff's land existed before innures to him, not because it may be formed as the result either of accretion or avulsion, or by the act of man, but by virtue of his title to the bed upon which the land is formed. The formation as to the *locus in quo* was before the Circuit Court of Appeals for the Sixth Circuit in the case of *Stockley v. Cissna*, *supra*, and in delivering the judgment of that court, Judge (now Mr. Justice) Lurton referred to the fact of the reappearance of the Trigg lands, either by accretion or some other process, saying:

> "As a consequence of the changed course of the river in 1876, these submerged Trigg lands have been restored, *through accretion or some other process*, and are now dry land. It cannot be pretended that, because the surface of these two bodies of Trigg land was washed off, Trigg lost his title to the land so submerged, beyond recovery. The law is otherwise. Land lost by erosion or submergence is regained to the original owner of the fee when by *relliction* or *accretion* the water disappears and the land emerges."
>
> 119 Fed. 831.

After quoting from Sir Matthew Hale's de Jure Maris, as republished in 16 Am. Rep. 54, et seq., *Mulry v. Norton, City of St. Louis v. Rutz*, the Court said:

> "The locality of the Trigg lands is not a matter

of dispute. It is, therefore, a matter of no importance how long they have been submerged.

The heirs of John Trigg, or those to whom he conveyed same, are the beneficiaries of the restoration. Accretions east of the Trigg lands must be accretions to Trigg's title as a riparian proprietor, for he did not lose this benefit because for a time his own lands were submerged or wasted by erosion. The new land forming where his land had been inured to him by virtue *of his title to the bed upon which the accretion was deposited,* but if the accretion extended beyond his original shore line, it became an addition to his firm land by the slow and imperceptible movement of his boundary calling for the river." (119 Fed. 832.)

This principle is announced in the case of *City of St. Louis v. Rutz,* 138 U. S. 226, 245; *Widdicombe v. Rosemiller,* 118 Fed. 295, and *Fowler v. Wood,* 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 570, from head notes of the latter case, we quote the following:

"NAVIGABLE STREAMS—Avulsion. Reappearance of Submerged Land. If a navigable river suddenly encroaches upon adjoining private land, the title to the submerged portion remains in the former owner. When thereafter such land rises to the surface, whether by the deposit of alluvion or by a change in the channel of the stream, dominion reattaches thereto as if never suspended, and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases." (117 Am. St. Rep. 534.)

If the right to recover submerged lands depended upon the principle of accretion, then where all of the land of a

riparian owner had been washed away, as in the case of the Trigg lands, and another, or interior, tract, had become the riparian tract, accretions to that tract would cut off the riparian owner when his lands reappeared, which is not the case.

Gilbert v. Eldridge, 47 Minn. 210.
Crandall v. Allen, 118 Mo. 403.
Ocean City Association v. Shriver, 64 N. J. L. 550.
Gale v. Kinzie, 80 Ill. 132.

In the case of *Hughes v. Birney's Heirs*, 107 La. 664, 32 So. 30, the Court held that the principles governing the acquisition of land by accretion or dereliction were not determinative of the controversy, though having bearing thereon. The fact that the land reappeared by accretion was not determinative in that case any more than in this. The syllabus prepared by the Court is as follows:

> "1. It is held that the doctrine of reappearance of land after submergence is the one that controls the case, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy though having a bearing upon the same.
>
> 2. If, after submergence, the water disappears from the land, either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner." (32 So. 30.)

In *Farnham on Waters*, Vol. 1, p. 331, the learned author, in footnote 1, says:

"If the sea swallow land, if the bounds can be ascertained, the owner may have them again if they are subsequently left to dry or are regained by him. And if the former extent of land can be known, it shall be returned to the owner.

Hale, de Jure Maris, Chap. 4.
Rolle's Abr. 168.
Sandars' Justinian, p. 169.

The former ownership of land submerged by the sea may be identified by mensuration, so that, if the sea suddenly swallow up 10 acres dry, the 10 acres may be reclaimed by admeasurement, but the locality must be proved. Hall, Seashore, 130. (Farnham on Waters, Vol. 1, p. 331.)

CONCLUSION.

We respectfully submit that the Supreme Court of Tennessee, in the case of *Muncie Pulp Company v. State*, 119 Tenn. 47, and Circuit Court of Appeals for the Sixth Circuit, in the case of *Stockley v. Cissna*, 119 Fed. 812, reached the right conclusion, and the principle applied in those cases is correct. Therefore, if this be true, then it follows, as pointed out in our original brief, that the center of the river bed of 1823-1835, as shown by Humphreys' map, is the boundary between the States along the abandoned channel of the river, and the commission should be so instructed.

Respectfully submitted,

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